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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-458

STATE OF NEW JERSEY, pursuant to § 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b),

Petitioner,

v.

GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY and CHRYSLER CORPORATION,

Respondents.

BRIEF FOR THE STATE OF CONNECTICUT AND THE COMMONWEALTH OF PENNSYLVANIA, ET AL. AS AMICI CURIAE IN SUPPORT OF THE PETITION OF THE STATE OF NEW JERSEY FOR CERTIORARI

This brief is submitted pursuant to Rule 42(4) of the Court's Rules by the State of Connecticut, Commonwealth of Pennsylvania, and the States of Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington and West Virginia.

INTEREST OF THESE AMICI CURIAE

Your *Amici*, as States of the Union, have an undeniable interest in the present action. The order of the District Court

raises once again the issue before this Court: What powers may a State constitutionally exercise in controlling its own state agencies and political subdivisions? Your *Amici* believe that the order of the District Court, combined with the failure of the Court of Appeals to apply the *Cohen* doctrine correctly, will have an unmistakably pernicious effect upon the fundamental relationship of the States to their respective governmental agencies, and upon further attempts at the type of innovative legislation which New Jersey has passed, in creating a model centralized authority for the conduct of federal antitrust litigation.[1]

The case at bar is one of those consolidated for pretrial purposes before the Honorable Frank J. McGarr in the United States District Court for the Northern District of Illinois at Multi-District Litigation Docket No. 65.[2]

Petitioner, the State of New Jersey, alleged in its original complaint that it brought this action on behalf of its political subdivisions upon two separate grounds: (1) as a representative pursuant to Rule 23 of the F.R.Civ.P.; and (2) pursuant to Section 12(b) of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b). Subsequently, the petitioner moved the Court for leave to amend its complaint in order to delete the class action provision. The District Court denied leave to amend stating that the petitioner must proceed by one of two alternate methods: naming all political subdivisions and public agencies as parties plaintiff, or proceeding pursuant to Rule 23 of the F.R.Civ.P. (App. B).[3]

---

[1] This is a time when many states are revamping and updating their antitrust legislation and are contemplating new laws. See Ariz. Rev. Stat. § 44-1411 *et seq.* (1974); Mo. Rev. Stat. § 416.011 *et seq.* (Aug. 13, 1974); Neb. Rev. Stat. § 59-821 *et seq.*, as amended by Legislative Bill No. 1028, effective April 16, 1974.

[2] In addition to this current multidistrict litigation, your *Amici* have also been participants in other multidistrict litigation involving antibiotic drugs, automobiles, gasoline, rock salt, asphalt, concrete and cast iron pipe, and master key and lock systems.

[3] Reference is made to Petitioner's Appendix.

The failure of the District Court to recognize that there does, in fact, exist a third alternative is a matter of grave import to your *Amici*.

The New Jersey statute, N.J.S.A. 56:9-12(b),[4] gives to the Attorney General of the State the clear authority to proceed in federal antitrust litigation not only on behalf of the State, but also on behalf of the State's political subdivisions and public agencies. Furthermore, Section 12(b) *uniquely* provides that said political subdivisions and public agencies may *not* sue on their own behalf without first obtaining the permission of the Attorney General. Thus, the State of New Jersey has removed from its political subdivisions and public agencies the capacity to sue on their own behalf.

The District Court, in substantively interpreting Section 12(b) of the New Jersey Antitrust Act, treated the petitioner's leave to amend as a type of subterfuge of Rule 23 of the F.R.Civ.P. Your *Amici* assert that a State does have the power to abrogate the capacity of its political subdivisions and public agencies to sue, and, in essence, to return the political subdivisions and public agencies to the corporate body of the State. The State of New Jersey, suing on behalf of its political subdivisions and public agencies, is *not* suing in a representative capacity. Rather, there is but *one unitary* plaintiff: the State of New Jersey.

The failure of the District Court to recognize the power of the State to sue as a unitary plaintiff, with the result that the petitioner is confined to Rule 23 of the F.R.Civ.P. is, in the opinion of your *Amici*, contrary to stated *principles* of

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[4] N.J.S.A. 56:9-12(b) states in relevant part:

The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General, may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law.

previous decisions of this Court. Moreover, the ruling of the District Court reveals that an important and novel question of federal/state/municipal relations has, heretofore, never been presented to this Court in its present form.

Your *Amici* believe that the issue centers ineluctably upon powers historically reserved to the States by the Tenth Amendment to the United States Constitution. We believe that the distinction that we shall draw, *infra*, was lost upon the District Court, and unrecognized by the Court of Appeals. (App. C)

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE DISTRICT COURT RAISES AN IMPORTANT QUESTION CONCERNING STATE/FEDERAL/MUNICIPAL RELATIONS, THE PRECISE TERMS OF WHICH HAVE NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

A. THERE IS NO CONFLICT BETWEEN THE NEW JERSEY STATUTE AND RULE 23 OF THE F.R.CIV.P.

1. In *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), the Supreme Court clearly enunciated the principle that a State Legislature may exercise extraordinary power over its own political subdivisions and public agencies:

> "This court has many times had occasion to consider and decide the nature of municipal corporations, their rights and duties and the rights of their citizens and creditors . . . . We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon whenever they may be applicable. Municipal corporations

> are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . *The State, therefore, at its pleasure may modify or withdraw all such powers,* . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. *All this may be done conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.* In all these respects the State is supreme and its legislative body, conforming its action to the state constitution, may do as it will . . . . *The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." Id.*, at 177-79. (emphasis added).

2. In recent years, the Supreme Court has applied the principle of *Hunter* v. *City of Pittsburgh* in specific circumstances. (See *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964)).

In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the respondents, therein, unsuccessfully attempted to exalt *Hunter* into an absolute. (*Id.*, at 342).

Mr. Justice Frankfurter stated:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.*, at 344-345.
>
> "When a State exercises power wholly within the domain of State interest, it is insulated from federal

judical review. But such insulation is not carried over when the State power is used as an instrument for circumventing a federally protected right." *Id.*, at 347.

Thus, restrictions upon the State are governed by reference to a specific federally protected right.[5] (See *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 109 (1967)).

3. In the case at bar, no constitutional prohibition is present.[6] The State of New Jersey has done nothing more or less than delimit the capacity of its political subdivisions and public agencies to sue on their own behalf.[7] In cases in which this Court has held that a State was restrained in its exercise of control over its political subdivisions and public agencies,

---

[5] In *Gomillion*, of course, the specific federal right was the right to vote as protected by the Fifteenth Amendment to the United States Constitution.

[6] In addition, the F.R.Civ.P. specifically provide that states may control the capacity of their political subdivisions to sue by creating state statutes for that purpose. (See F.R.Civ.P. 17(b)). In fact, in *State of Illinois* v. *Bristol-Myers Company*, 470 F.2d 1276 (D.C. Cir. 1972), the court noted, in reference to an action brought pursuant to the Illinois Antitrust Act, that the District Court had properly permitted Illinois to proceed "on behalf of all political subdivisions organized *under state authority*, pursuant to Illinois Revised Statutes". *Id.* at 1277. (emphasis added).

However, your *Amici* wish to make clear that we do not suggest, and New Jersey does not argue, that a state must possess a state statute permitting antitrust actions on behalf of political subdivisions and public agencies before its Attorney General may bring such actions in Federal Court. Rather, each state's Attorney General may proceed as a representative of a class composed of the governmental entities organized under state law. (See *State of Illinois* v. *Bristol-Myers, supra; Illinois* v. *Assoc. Milk Producers*, 351 F.2d 436 (N.D. Ill. 1972)).

Further, independent and sufficient federal support and authority for the state to serve as statutory representative of its political subdivisions emanates from Rule 17(a) F.R.Civ.P. which provides in relevant part: "an executor . . . *or a party authorized by statute may sue in his own name* without joining with him the party for whose benefit the action is brought." (emphasis added)

[7] It should be noted that this Court has previously held that municipal corporations have no privileges or immunities. *Trenton* v. *New Jersey*, 262 U.S. 182 (1923).

the federally protected right was that right actually possessed by the *citizens* of said municipality.[8]

4. Moreover, the New Jersey Antitrust Act constitutes innovative state legislation, creating a state-wide authority under the control of the Attorney General for the prosecution of federal antitrust violations.[9] There thus exists a legitimate, if not overriding, state interest in the abrogation of the capacity of the political subdivisions and public agencies to sue on their own behalf without the prior consent of the Attorney General.

5. The District Court, below, treated the New Jersey Statute as a subterfuge of Rule 23 of the F.R.Civ.P. and thus, *sub silentio*, has stated that N.J.S.A. 56:9-12(b) is inconsistent with federal law. (App. B)

Since the power of the State to abrogate the capacity of its political subdivisions and public agencies to sue on their own behalf is not impaired by any provision of the United States Constitution, reliance upon Rule 23 and, more importantly, upon the procedural safeguards of which the courts below speak, are entirely inapposite.[10]

---

[8] For example, the right to vote in *Gomillion* was that right possessed by the disenfranchised black citizens of the city of Tuskegee.

[9] This Court has steadfastly supported the view that so long as they avoid conflict with the federal laws, "the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standards of the public welfare . . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). The states must have "vast leeway in the management of [their] internal affairs." *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 109 (1967). Since the States have "broad scope to experiment with economic problems," *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963), they "must be allowed considerable latitude in attempting their resolution." *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973).

[10] In *State of California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973) *parens patriae* was rejected as a substitute for Rule 23 in part because procedural safeguards were lacking. The "class" in *Frito-Lay*, though, was not composed of political subdivisions, but rather citizen/consumers. The Fourteenth Amendment problems in the case are thus obviously distinguishable from the instant action.

The State, thus, stands in an entirely different relation to its political subdivisions and public agencies than a State does to its citizens, or a representative of a class does to the members of the class.

A State, as here, in abrogating the capacity of its governmental agencies to sue has removed their capacity to be deemed "persons" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15. Consequently, if a political subdivision is not a "person", *a fortiori*, it cannot be a member of a class of "persons" vindicating an interest under the antitrust laws pursuant to Rule 23. On the other hand, it is axiomatic that a state could not abrogate the capacity of its *individual citizens* to be deemed "persons" within the meaning of Section 4 of the Clayton Act.

Thus, the State of New Jersey may constitutionally abrogate the capacity of its political subdivisions and public agencies to sue on their own behalf, return said entities to the corporate body of the State, then sue on behalf of said entities as a unitary plaintiff without being treated as the representative of a class pursuant to Rule 23 of the F.R.Civ.P.

6. Your *Amici* believe, for the reasons stated, *supra*, that the decision of the District Court constitutes a clear encroachment upon an area of law reserved to the States by the Tenth Amendment to the United States Constitution.

B. THIS AMICUS BRIEF ATTESTS TO THE SIGNIFICANCE OF THE CASE.

In *Georgia* v. *Evans*, 316 U.S. 159 (1942), wherein a State was deemed to be a "person" within the meaning of the treble damage provision of the federal antitrust laws, 15 U.S.C. § 15, this Court, per Mr. Justice Frankfurter, noted:

> "The importance of the question . . . is attested by the fact that thirty-four states, as friends of the Court, supported

Georgia's request that the decision be reviewed on certiorari. *And so we brought the case here." Id.,* at 161. (emphasis added).

Your *Amici*, thirty-six States of the Union, are here again urging this Court to accept a case on certiorari which raises an important question concerning federal/state/municipal relations.

II

THE ISSUE WAS PROPERLY APPEALABLE WITHIN THE MEANING OF THE COHEN DOCTRINE

The order of the District Court must be inspected carefully, for it is apparent to your *Amici* that the courts below misconstrued the original motion of the Petitioner. The manner in which the District Court's order is framed indicates that the District Court interpreted the original motion as a request to amend the complaint in order to convert the prior action, on behalf of the State, into a class action on behalf of all unnamed political subdivisions.[11]

The actual intent of the Petitioner's motion, was not to convert the prior action into a class action, but rather it was an attempt to amend the complaint to bring the action solely "pursuant to provisions of the New Jersey Antitrust Act, N.J.S.A. 56:9-12(b)."

The Petitioner's claim is that it has been empowered by N.J.S.A. 56:9-12(b), pursuant to the powers reserved to the States by the Tenth Amendment to the United States Con-

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[11] "For these reasons, the motion of the plaintiff State of New Jersey for leave to file an amended complaint *converting the prior action on behalf of the State into a class action on behalf of all unnamed political subdivisions of the State is denied."* (Emphasis added by your *Amici*) (App. B)

stitution, to bring antitrust actions on behalf of the State, its political subdivisions, and public agencies wherein the sovereign State "shall be deemed a person". The issue therefore is not the proper joining and identification of parties, nor is it the proper certification under Rule 23, F.R.Civ.P. Rather, the issue is the extent of the State's sovereign power over its public agencies and political subdivisions as suggested in Section I-A of this brief.

Viewed in this light, your *Amici* urge that the order appealed from is final and appealable under 28 U.S.C. § 1291 as interpreted in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

It was held by the Court of Appeals below that the order would be "final" and appealable if it met the three characteristics of the *Cohen* doctrine. (App. C) It was further held that the order satisfied the first characteristic, *viz.* the order was a final determination of a separate and collateral claim of right. However, the Court also held that the order failed to meet the remaining two characteristics of the *Cohen* doctrine. As stated in the opinion by the Court of Appeals, below, these are:

> ". . . (2) it must be 'too important to be denied review,' in the sense that it presents a serious and unsettled question; and (3) its review cannot, in the nature of the question that it presents, await final judgment because 'when that time comes it will be too late effectively to review the . . . order and rights conferred will have been lost, probably irreparably.' *Id.*, at 546-47." (App. C)

It can no longer be said that these two characteristics of the *Cohen* doctrine are not satisfied. This is a serious and unsettled question, the review of which cannot await final judgment. This is not a simple question regarding alternative methods of proceeding, but rather it is an important, complex, and unsettled question that goes right to the heart

of the Tenth Amendment to the United States Constitution. The response by your *Amici* to this question attests to its seriousness. (See Section 1-B, *supra*) Furthermore, this is not a question that can await final judgment for review. The order as framed has extinguished Constitutional and statutory rights of New Jersey, which rights will be irreparably lost if review is delayed.

For these reasons your *Amici* contend that the order of the District Court did fall within the *Cohen* doctrine, and is a final and appealable order.

CONCLUSION

Your *Amici*, thirty-six States of the Union, respectfully urge this Court to grant the petition for a writ of certiorari prayed for herein by your Petitioner, the State of New Jersey.

Respectfully submitted,

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